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No. 00-927

IN THE

Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
Petitioner,

v.

MALLARD BAY DRILLING, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury. Since 1947, ATLA's Admiralty Law Section has worked to protect the safety and legal rights of seamen and those who work aboard vessels.

ATLA's mission includes the active support of regulation to ensure safe workplaces. ATLA is deeply concerned that the lower court's decision in this case has the practical effect of depriving an important class of workers – seamen on uninspected vessels – of the protection of workplace safety regulations.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in this case expresses a decidedly minority viewpoint among the circuits and undermines the intent of Congress to achieve maximum safety protection for all American workers. Congressional concern for the welfare and protection of seamen was demonstrated by the enactment of the Jones Act, 46 U.S.C. App. § 688, which extended the protection of the Federal Employers Liability Act, 45 U.S.C. § 51 et seq., especially including the safe place to work doctrine, to seamen.

Interpreting 29 U.S.C. § 653(b)(1) to deprive seamen working on uninspected vessels of the regulatory protection afforded by OSHA conflicts with the workplace safety protection afforded to most other American workers. This interpretation also conflicts with the rationale behind the passage of the Jones Act. Uninspected vessels, such as the drilling barge at issue here, are subject only to extremely limited Coast Guard regulation. Affirmance of the Fifth Circuit's decision would, as a practical matter, mean that workers on uninspected vessels, including seamen, would be deprived of both the full Coast Guard protection afforded

workers on inspected vessels and the extensive OSHA protection afforded most other workers.

This unfortunate result is not required by the statute. Indeed, the Fifth Circuit appears to have had to strain the relevant statutory language to reach this result. Because the Coast Guard does not exercise statutory authority to enforce standards or regulations affecting occupational safety or health as related to the working conditions, except as to a limited number of specified conditions not pertinent to the accident at issue, OSHA, and the OSHA regulations promulgated thereunder, are applicable. That is the position taken by both OSHA and the Coast Guard with respect to uninspected vessels, and their interpretation of the statute is entitled to considerable weight.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE WELL-REASONED WEIGHT OF AUTHORITY THAT SEAMEN ON UNINSPECTED VESSELS ARE ENTITLED TO OSHA PROTECTION.

The relevant provision of the Occupational Safety and Health Act (OSHA) provides that nothing in the Act "shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). The issue before the Court is whether this language serves to insulate employees and seamen working on uninspected vessels, who are at best afforded only minimal safety protection by Coast Guard regulations, from the duty of compliance with OSHA and the OSHA regulations promulgated thereunder.

The Fifth Circuit, in the case under review, answered that question in the affirmative. *Mallard Bay Drilling, Inc. v.*

Herman, 212 F.3d 898 (5th Cir.), *reh'g denied*, No. 99-60124 (5th Cir. Aug. 8, 2000).[2]

ATLA respectfully disagrees with the decidedly minority viewpoint expressed by the Fifth Circuit and asserts, in accord with the majority of circuits to consider the question, that seamen employed on uninspected vessels on navigable water are entitled to OSHA protection, at least where the Coast Guard has not regulated the particular working conditions at issue.

The Fifth Circuit stands virtually alone in taking the position that "the Coast Guard has exclusive authority over the working conditions of seamen," *Mallard Bay*, 212 F.3d at 900 (citing *Clary v. Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980)), and that "OSHA regulations do not apply to *working conditions* of *seamen* on *vessels* in navigation," 212 F.3d at 900 (quoting *Donovan v. Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983) (*Mallard Bay* court's emphasis)), even where, as in the case at bar, a seaman is injured while working aboard an uninspected vessel. 212 F.3d at 901.

That position is in irreconcilable conflict with the positions taken by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 778-80 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 594 (2d Cir. 1998); the Ninth Circuit in *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1242-46 (9th Cir. 1998), *aff'g Secretary of Labor v. Tidewater Pacific Inc.*, 17 O.S.H. Cas. (BNA) 190 (OSHRC 1997); and the Eleventh Circuit in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530-32 (11th Cir.),

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[2] Secretary Herman's successor in office as Secretary of Labor, Elaine L. Chao, has been automatically substituted as Petitioner pursuant to Sup. Ct. R. 35(3).

reh'g denied, 790 F.2d 80 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1988).

While Respondent might assert that the Fourth Circuit's decision in *Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), is in accord with the Fifth Circuit's decision in the case at bar, that assertion would be without merit. The pertinent question in *Taylor* concerned whether Coast Guard regulation of carbon monoxide in the holds of vessels preempted OSHA regulation with respect to longshoremen. The *Taylor* court answered that question in the negative, and its observations pertaining to responsibility for the safety of seamen is therefore clearly dictum. Further, the *Taylor* court made no reference to the distinction between inspected and uninspected vessels, and, indeed, did not identify the class of vessels to which the vessel there at issue belonged. As perceptively observed by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985):

> In *Taylor*, the question was whether certain Coast Guard regulations applied to "longshoremen," not whether OSHA regulations applied to "seamen" aboard uninspected vessels. Again, the court did not consider the void or *lacunae* which existed by virtue of the lack of pervasive Coast Guard regulation of working conditions of employees aboard uninspected vessels. Hence, *Taylor* cannot be said to have precedential authority.

739 F.2d at 779.

It should also be noted that a more recent Fourth Circuit case, *Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994),

makes it clear that *Taylor* is not applicable to *uninspected* vessels.[3] While following *Taylor*, the *Muth* court noted:

> OSHA has acknowledged explicitly its limited authority over seamen aboard Coast Guard-inspected vessels. OSHA has entered into a "Memorandum of Understanding" with the Coast Guard, 48 Fed.Reg. 11,365 (1983), the purpose of which is to "set forth clearly the boundaries of the authority" of the Coast Guard and OSHA "in prescribing and enforcing standards or regulations affecting the occupational safety and health of seamen aboard vessels inspected and certified by the Coast Guard." *Id.* The agreement notes that "[t]he Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard inspected vessels." *Id.* While the agreement cedes essentially all authority over seamen to the Coast Guard, it does not address the division of responsibility between the two agencies regarding individuals other than seamen.

34 F.3d, at 244 n.2. It is highly significant that the "Memorandum of Understanding" (App. F to the Secretary's

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3 An "uninspected vessel" is defined as:

> a vessel not subject to inspection under section 3301 of this title that is not a recreational vessel.

46 U.S.C.A. § 2101(43) (Partial Revision 2000). Section 3301 lists 14 categories of vessels subject to inspection. It is undisputed that the instant drilling barge, the *Mr. Beldon*, was an "uninspected vessel."

Petition for a Writ of Certiorari) states unequivocally that "[n]othing in this MOU pertains to *uninspected* vessels" (emphasis added). *See also Herman v. Tidewater Pacific, Inc.*, where the Ninth Circuit, following its discussion of *Taylor*, stated that "[a]lthough not specifically saying so, the case seems to be like *Kopczynski* and was decided by the *status* of the plaintiff." 160 F.3d at 1245 (emphasis added) (referring to *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985)).

II. THE DECISION BELOW LEAVES SEAMEN ON UNINSPECTED VESSELS UNPROTECTED BY ADEQUATE SAFETY REGULATION OF WORKING CONDITIONS.

When two federal agencies share the power to regulate workplace safety, the unexercised power by one agency does not preclude the other agency from exercising its concurrent authority. For example, in *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985),[4] OSHA regulations were held to apply to the plaintiff's railroad employer, in the absence of railroad regulations covering the relevant procedure and equipment to be used:

> The question before us, then, is whether *any* exercise of regulatory authority is sufficient to exempt the railroad industry from coverage by OSHA or whether only an actual exercise of authority in a particular area will exempt that area from OSHA coverage. This court has previously ruled that "OSHA's

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4 *Pratico* was questioned on other grounds (pertaining to the effect of OSHA violations) in *Elliot v. S.D. Warren Co.*, 134 F.3d 1, 4, 5 (1st Cir. 1996) (applying federal and Maine law). However, the viability of *Pratico* on the point for which it is here cited is not affected.

> authority to regulate a given working condition . . . is foreclosed only insofar as another agency has exercised its authority to regulate that working condition. Thus, in order for the exemption to apply it must be shown that another agency has exercised its authority to regulate the 'working condition' involved here."

Id. at 262 (quoting *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981)) (*Pratico* court's emphasis). The cases cited by the *Pratico* court on that point included *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 778 (2d Cir. 1984), and the Fifth Circuit's opinion in *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). *Accord, Association of American Railroads v. Department of Transportation*, 38 F.3d 582, 586 (D.C. Cir. 1994). The *Southern Pacific* court concluded by holding:

> To summarize our view of section 4(b)(1), OSHA coverage is displaced by an "exercise" of DOT authority only for the "working condition" embraced by that exercise. Since DOT has not yet exercised its authority on the working conditions which are the subject of these OSHRC orders, the petitions for review are DENIED.

539 F.2d at 393 (emphasis added). In light of these authorities, 29 U.S.C. § 653(b)(1) cannot be interpreted to prevent application of OSHA to uninspected vessels since the Coast Guard has promulgated only minimal regulations with respect to such vessels.

The Coast Guard's regulation of uninspected vessels is of a highly limited nature, not at all comparable to the intensive regulation to which any workplace is subjected under OSHA. Nonrecreational uninspected vessels must

comport with the safety equipment requirements imposed by 46 U.S.C. § 4102 (Partial Revision 2000). In relevant part, that section requires fire extinguishers, *id.* § 4102(a), lifesaving equipment, *id.* § 4102(b), efficient flame arresters, backfire traps, or similar devices, *id.* § 4103(c), and the means "for properly and efficiently ventilating the bilges of the engine and fuel tank compartments, so as to remove any explosive or flammable gasses." *Id.* § 4102(a); *see also* 46 C.F.R. pts. 24, 25 (2000) (setting out certain requirements applicable to uninspected vessels). There are additional areas in which uninspected vessels are subject to Coast Guard regulation, as set out by the Ninth Circuit in *Herman v. Tidewater Pacific, Inc.*, 160 F.3d at 1242. The key point is that none of those provisions governs, or has any bearing on, safety regulation of oil and gas drilling operations.

It is submitted that the Ninth Circuit was clearly correct when holding in *Herman v. Tidewater Pacific, Inc.*:

> While uninspected vessels are subject to many statutes and regulations, *only a small subset of these apply to "working conditions of employees with respect to which [the Coast Guard] . . . exercise[s] statutory authority* to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). The all-encompassing statutory provisions regarding seaworthiness are not enforced by the Coast Guard but by the courts. 46 U.S.C. § 10903. Moreover, Coast Guard regulation of the crew is not regulation of a "working condition." We are thus left with the regulations specific to certain conditions aboard uninspected vessels and those regulations applicable when the uninspected vessel is pressed into certain services. *In light of the Coast Guard's unequivocal denial of any comprehensive*

> *regulation of uninspected vessels, the Coast Guard has not exercised its authority in this area.*

Id. at 1246 (emphasis added). The court therefore affirmed the decision of the OSHRC. Following a discussion of the limited scope of Coast Guard regulation, the Commission had concluded:

> As to the uninspected fleet, OSHA provides the *only* significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

17 O.S.H. Cas. (BNA) at 1928 (Commission's emphasis).

III. THE DECISION BELOW CONFLICTS WITH THE POSITION OF BOTH OSHA AND THE COAST GUARD THAT OSHA REGULATIONS ARE APPLICABLE ON UNINSPECTED VESSELS.

It cannot be emphasized too strongly that this Court is not being asked to resolve a conflict over regulatory "turf" between the Department of Labor and OSHA on the one hand and the Department of Transportation and the Coast Guard on the other. Rather, these Executive Branch departments and agencies are united in the view that where uninspected vessels are concerned, the crews of those vessels are entitled to the safety protection afforded by OSHA and the OSHA regulations promulgated thereunder. The above-cited "Memorandum of Understanding" (MOU) between OSHA and the Coast Guard expressly and unequivocally stated that "[n]othing in this MOU pertains to uninspected vessels." (MOU at 1, Secretary's Appendix at 62a.)

The Fifth Circuit has not cited anything at all indicating the Coast Guard's belief, contradicting the MOU,

that employees aboard uninspected vessels were intended to be deprived of OSHA protection. Rather, this assertion has been made only by an employer desiring to avoid the burdens of OSHA regulations. Such desire should not be honored.

Attention is particularly called to a Directive recently issued by OSHA's Director of Compliance Programs, Directive CPL 2-1.20 "OSHA/U.S. Coast Guard Authority over Vessels" (November 8, 1996 [hereinafter "Directive"]). The Directive deals separately with inspected vessels, commercial uninspected fishing vessels, and (the category here at issue) *commercial uninspected vessels* (other than uninspected fishing vessels).

The Directive states:

> **Authority Over Commercial Uninspected Vessels (Other than Commercial Fishing Vessels).** The U.S. Coast Guard conducts limited safety checks on "uninspected vessels." The Coast Guard has regulations dealing with, and conducts safety checks of, working conditions on commercial uninspected vessels involving personal flotation devices, lifesaving equipment, fire extinguishing equipment, fire fighting equipment, ventilation of engine bilges and fuel tank compartments, and back-fire traps/flame arresters on inboard engine carburetors using gasoline as fuel. *Any other working condition on board a commercial uninspected vessel is subject to OSHA authority.*

Directive P at 13 (emphasis added). It is further provided therein:

> **OSHA Requirements Enforceable on Uninspected Vessels (Other than Commercial Fishing Vessels).** OSHA may

> exercise its authority to cite all employers for all violative working conditions affecting their employees on uninspected vessels when such violations occur within OSHA's geographical jurisdiction and when such violations are not specifically addressed by a Coast Guard regulation.
>
> 1. An owner, operator, agent or master of an uninspected vessel may be cited for hazards to which **any employees, including seamen,** it employs are exposed if the hazard is not regulated by the U.S. Coast Guard.

Directive R at 14 (emphasis in original). The Coast Guard Regulations Uninspected Vessels are listed in Appendix C of the Directive (pages 22, 23). It is reiterated that none of these regulations has even the remotest relation to the oil and gas drilling function of the drilling barge here at issue.

OSHA's longstanding construction of the OSH Act, an act which it has been entrusted by Congress to administer, is entitled to substantial deference. In the leading case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that if a

> statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843. The Court also held that

> a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 844. The *Chevron* court further stated that this Court has

> long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

Id. In *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), the Court reiterated:

> If the agency's reading fills a gap or defines a term in a reasonable way in light of the legislature's design, we give that reading controlling weight, even if it is not the answer "the court would have reached if the question initially had arisen in a judicial proceeding."

Id. at 457 (quoting *Chevron*, 467 U.S. at 843 n.11).[5]

To the extent that Respondent may argue that OSHA's position has been inconsistent, based on the OSHRC's statement in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1659 (OSHRC 1982), to the effect that 29 U.S.C. § 653(b)(1) "in certain circumstances can create industry-wide exemptions from the OSH Act," 10 O.S.H. Cas. (BNA) at 1860, such an assertion would be completely without merit. In *Secretary of Labor v. Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 169 (OSHRC 1992),

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[5] Even if "*Chevron*-style deference" is not warranted, pursuant to *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 1662-63 (2000),

> It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'

Olmstead v. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 2186 (1999) (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

the Commission rejected as obiter dictum the *Dillingham* language in question, holding:

> We believe, however, that the Commission did not hold in *Dillingham* that an industry-wide exemption had been created. The Commission observed that, under certain circumstances, such a situation *could* exist, but its disposition of the case was based on a finding that the Coast Guard had, in fact, exercised its statutory authority to regulate the working conditions that were the subject of the Secretary's citation, the hazard of a seaman's falling into the water while engaged in navigational, docking, or mooring activities. Because the Coast Guard had already regulated the general hazard addressed by OSHA's citation, the same result would have been found under the existing case law, and it was unnecessary for the majority in *Dillingham* to go as far as it did. To the extent that the discussion in *Dillingham* went beyond what was strictly necessary to adjudicate the issues presented by that case, it constituted *obiter dictum* (remarks not necessary to decide the case) and therefore is not controlling here.

Id. at 1704-05 (Commission's emphasis). Significantly, as pointed out in *Cook v. Ancich*, 119 F. Supp. 2d 1118 (W.D. Wash. 2000), in *Alaska Trawl Fisheries, Inc.*:

> [B]oth the secretary [of Labor] and the Coast Guard via an *amicus* brief argued that OSHA regulations were applicable to the working conditions on the uninspected vessels in question.

119 F. Supp. 2d at 1119; *see Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) at 1702-03.

In any event, the Court has held that deference is owed to the Secretary's interpretation of the statutory language, and not to that of the Commission. *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 150-53 (1991); *accord CH2M v. Hill, Inc.*, 192 F.3d 711, 716 (7th Cir. 1999).

IV. THE DECISION BELOW CONFLICTS WITH THE INTENT OF CONGRESS TO PROVIDE SAFE WORKING CONDITIONS FOR ALL WORKERS.

The OSHA Directive referred to above emphasized that Congress did not intend that any group of workers be left without the protection of workplace safety regulations:

> The legislative history, as a whole, clearly shows that every amendment or other proposal which would have resulted in any employee's being left outside the protections afforded by the Act was rejected. The reason for excluding no employee, either by exemption or limitation on coverage, *lies in the most fundamental of social purposes of this legislation which is to protect the lives and health of human beings in the context of their employment.*

29 C.F.R.§ 1975.3(a) (emphasis added). It is further provided:

> (c) In the case of section 4(b)(1) of the Act, which makes the Act inapplicable to working conditions to the extent they are protected under laws administered by other Federal agencies, *Congress did not intend to grant any general exemptions under the Act*; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a

> national policy of occupational safety and health protection.

Id. § 1975.3(c) (emphasis added).

The crux of the case cannot be summed up more cogently than was done by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*:

> It would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulations of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act. There can be no doubt that it was the intent of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. § 651(b). . . . It is also beyond question that section 4(b)(1) of the OSH Act should be interpreted and applied "to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry. Co.*, 539 F.2d at 338.

739 F.2d at 780 (emphasis added) (citation omitted). *See also, e.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).(the OSH Act "is to be liberally construed to effectuate the congressional purpose"). As the court emphasized in *E&R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3d Cir. 1997):

> In light of the OSH Act's broad remedial purpose, the Act and regulations issued pursuant to it should be liberally construed so as to afford the broadest possible protection to workers.

Id. at 160 (citing *Whirlpool*, 445 U.S. at 12, 13).

The *Red Star Marine* court concluded, on the relevant point:

> To agree with the views expressed by Red Star would result in this Court mandating the *status quo*. *As a practical matter, this would mean that neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees* exposed to the hazard of excessive noise.
>
> *In light of the extensive tradition of congressional concern for mariners, Congress could not have intended that employees aboard uninspected vessels be deprived of the protections accorded the vast majority of American workers by the OSH Act*, and those protections offered employees aboard inspected and certificated vessels. It is clear that the Coast Guard's regulation of uninspected vessels is limited to only a few areas. Consequently, it cannot be said that it is exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels.
>
> Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act, we hold that OSHA possesses statutory authority to regulate the working conditions of employees aboard uninspected vessels.

739 F.2d at 780 (emphasis added). This language aptly states the rationale compelling reversal of the Fifth Circuit decision under review.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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